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In The

Supreme Court of the United States

October Term, 1997

IN THE MATTER OF BUNKER GROUP, INC.; BUNKER GROUP PUERTO RICO, INC.; and NEW ENGLAND MARINE SERVICES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MEMORANDUM OF *AMICUS CURIAE*

CARL R. NELSON
Counsel of Record
FOWLER, WHITE, GILLEN, BOGGS, VILLAREAL AND BANKER, P.A.
P.O. Box 1438
Tampa, Florida 33601
(813) 228-7411

Member of the United States Supreme Court Bar

Counsel for Amicus Curiae, Bouchard Transportation Co., Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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MEMORANDUM OF *AMICUS CURIAE*

Now comes Bouchard Transportation Co., Inc., *amicus curiae*, by its undersigned counsel, and prays that the Court reserve ruling on the petition for writ of certiorari to the United States Court of Appeals for the First Circuit. There is currently pending in the United States Court of Appeals for the Eleventh Circuit three consolidated cases in which the Eleventh Circuit is considering the issue raised in the petition. The analysis of the Eleventh Circuit may be of assistance to the Court.[1]

STATEMENT OF THE CASE

The *amicus curiae* adopts the Statement of the Case as set forth in the petition.

INTEREST OF THE *AMICUS CURIAE*

On August 10, 1993, two tug-barge units and a freighter were involved in a collision on Tampa Bay, resulting in the discharge of petroleum products into Florida's navigable waters. The *amicus curiae* was the operator of one of the tug-barge units. *See Bouchard*

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[1] The parties have consented to the filing of this memorandum.

Counsel for a party did not author this brief in whole or in part. A monetary contribution to the preparation and submission of this memorandum will be made by the indemnity insurer of the *amicus curiae*, The West of England Ship Owners Mutual Insurance Association (Luxembourg).

Transp. v. Florida Dept. of Envir. Prot., 91 F.3d 1445 (11th Cir. 1996), and *Boca Ciega Hotel, Inc. v. Bouchard Transportation Company, Inc.*, 51 F.3d 235 (11th Cir. 1995).[2]

Arising out of the Tampa Bay accident, there are currently pending in the Eleventh Circuit three cases[3] in which the primary issue is essentially the same issue raised in the petition for writ of certiorari to the First Circuit, heretofore the only circuit court to consider the issue. Oral argument was received by the Eleventh Circuit on January 15, 1998, and the consolidated cases remain under submission.

Petitioners did not mention the Eleventh Circuit cases in their petition, and the *amicus curiae* wishes to bring the Eleventh Circuit cases to the attention of the Court.

In this memorandum, the *amicus curiae* urges the Court to reserve ruling on the petition for writ of certiorari until after the Eleventh Circuit renders its decision and opinion. It will be shown below that there is a significant procedural difference between the Eleventh Circuit cases and the case at bar. The Eleventh Circuit is expected to consider this procedural difference, and its analysis may be of assistance to the Court.

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[2] In the opinions in these two cases, there are some factual and procedural inaccuracies not important here.

[3] *Complaint of Bouchard Transportation Co., Inc., etc. v. The United States, et al.*, case number 96-3494, consolidated with *Complaint of Maritrans Operating Partners, etc. v. The United States*, case number 96-3727, and *Complaint of Tsacaba Shipping Co., Inc. etc. v. The United States*, case number 96-3605.

MEMORANDUM

Following the accident on Tampa Bay on August 10, 1993, described above, the owners and operators of the two tug-barge units and of the freighter commenced limitation proceedings in the United States District Court for the Middle District of Florida under Rule F, Supplemental Rules for Certain Admiralty and Maritime Claims ("Supplemental Rule F").

The owners and operators of the two tug-barge units were accused of discharging petroleum products and were designated "responsible parties" by the Coast Guard under § 2701(32)(A) of the Oil Pollution Act of 1990 ("OPA 90"), 33 U.S.C.A. §§ 2701-61 (West Supp. 1998).[4]

These "responsible parties" used the procedure of Supplemental Rule F to seek limitation of liability under OPA 90 § 2704 as to claims defined in OPA 90 and under the Limitation of Shipowner's Liability Act of 1851 ("Limitation Act"), 46 U.S.C. §§ 181-189, as to claims brought under the general maritime law and under Florida law.[5] The owner of the freighter, which had not been designated a "responsible party" under OPA 90, sought limitation only under the Limitation Act.[6]

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[4] All references to OPA 90 are to 33 U.S.C.A. (West Supp. 1998).

[5] The "responsible parties" also sought limitation as may be allowed under any other federal or state limitation statute.

[6] "Responsible party" is a term used in OPA 90 to designate the owner, operator, or demise charterer of a vessel from which oil is spilled. OPA 90 § 2701(32)(A). "Responsible party" does not necessarily equate to "at fault party" because a "responsible party" may assert absolute defenses to liability. OPA 90 § 2703.

In the limitation cases commenced by the "responsible parties," injunctions were entered under Supplemental Rule F(3) that were tailored to accommodate the claims presentation procedure of OPA 90 § 2713(a), which requires claimants in the first instance to present their claims directly to "responsible parties" before commencing litigation. *See Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., Inc.*, 51 F.3d 235 (11th Cir. 1995) (enforcing the claims presentation procedure as a condition precedent to commencing suit). The injunctions read in relevant part as follows:

> ORDERED, that the notice provision of subsection (4) of Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims (Rule F) and the Claims and Answer provisions of subsection (5) of Rule F are not to apply to any person who presents a claim to Turnaboat Services, Ltd. [responsible parties' claims service] for oil pollution damages as defined in the Oil Pollution Act of 1990, 33 U.S.C. § 2702, unless and until that person brings a lawsuit in any Court, at which time Plaintiffs must serve Notice on that person in accordance with Rule F(4) and thereupon that person shall file a claim and answer herein in accordance with Rule F(5).

Copies of the injunctions are attached as an Appendix.

The "responsible parties" felt this language of the injunctions implemented the claims presentation procedure of OPA 90 § 2713(a) and made the use of Supplemental Rule F procedure compatible with OPA 90.

In the case at bar, however, the district court in Puerto Rico took an entirely different approach. The court entered an injunction that required claimants to file their

claims in the limitation proceedings within fifty-one days, and no provision was included to allow claimants the opportunity to present claims to the vessel owners under OPA 90 § 2713(a). *See Complaint of MetLife Capital Corp.*, 132 F.3d 818 (1st Cir. 1997).

This difference in the form of injunctions (entered in Tampa and in Puerto Rico) is expected to receive focused attention by the Eleventh Circuit, and its analysis may prove of value to this Court in considering the petition for writ of certiorari.[7]

The district court in Tampa dismissed the consolidated limitation cases as to all claimants to the limited extent that claimants' claims were filed under OPA 90.[8]

The *amicus curiae* appealed the dismissal to the Eleventh Circuit, and the companion appeals of the other two vessel interests were consolidated therewith. The primary issue under consideration by the Eleventh Circuit is as follows:

> Whether vessel owners may use the admiralty limitation of liability procedure of Supplemental Rule F to allow for the efficient resolution in a single forum of all claims arising out of a maritime incident involving an oil spill.

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[7] The issue is also pending before the Second Circuit in *Complaint of Odin Marine Corp.*, case number 97-6266. Briefing is closed, but oral argument has not yet been scheduled. The injunction in *Odin Marine* was similar to that issued in the case of the *amicus curiae*.

[8] The cases were also dismissed as to the Florida Department of Environmental Protection on Eleventh Amendment grounds, but that is not an issue here.

Included within this broadly stated issue is the issue raised in the petition for writ of certiorari, whether Supplemental Rule F is an appropriate procedural device for seeking limitation under OPA 90 as well as under the Limitation Act.

Both statutes provide for limitation of liability, although the standards for limitation and the amount of limitation differ under the two regimes.[9]

A *concursus* of claims in a single forum is necessary to give effect to any limitation regime, whether under the Limitation Act (limitation to the value of a vessel) or under OPA 90 (limitation to $1,200 per gross ton of a vessel). This principal was recognized when the Limitation Act was first considered by this Court. The Limitation Act, in its original form, was void of any procedure to give it effect,[10] prompting this Court to observe as follows:

> Unless, therefore, the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the Legislature has

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[9] Under OPA 90, limitation is allowed unless the responsible party was grossly negligent or violated a federal regulation, 2704(c), and the amount is based on the size or carrying capacity of the discharging vessel, such as $1,200 per gross ton under § 2704(a)(1)(A). Under the Limitation Act, limitation is allowed if the owner can show that it lacked privity or knowledge of a cause of the accident, and the amount is based on the value of the vessel. 46 U.S.C. § 183.

[10] Procedure was added to the Limitation Act by Congress in 1936. Act of June 5, 1936, ch. 521, § 3, 49 STAT. 1480, 1479-81 (codified *as amended* at 46 U.S.C. § 185), 1936 A.M.C. 920, 922.

> passed a law which is incapable of execution. This is never to be done if it can be avoided.

The Norwich & N.Y. Transp. Co. v. Wright, 80 U.S. (13 Wall.) 104, 20 L. Ed. 585, 592 (1872).

Accordingly, the Court determined in its opinion the procedure for shipowners to follow, which included a *concursus* of claims in a single forum. *Id. See* Petition for Writ of Certiorari at p. 5 (setting forth the history and origins of Supplemental Rule F).

In its present form OPA 90 includes no procedural device for a "responsible party" to follow to seek limitation just as the Limitation Act included no procedure for vessel owners to follow to seek limitation. However, there is a difference between the state of the law in 1872 when *The Norwich* was before the Court and the state of the law today. There does now exist a suitable rule for administering OPA 90, Supplemental Rule F, which, applies whenever a vessel owner seeks to obtain "limitation of liability pursuant to statute." Supplemental Rule F(1). The injunction issued under Supplemental Rule F(3) in the case of the *amicus curiae* established a *concursus* of claims in a single proceeding, allowing execution of the limitation provisions of § 2704(a) of OPA 90, without interfering with the claims presentation provision of § 2713(a).

CONCLUSION

The *amicus curiae* submits that the Court should reserve ruling on the petition for writ of certiorari until the analysis of the Eleventh Circuit is available for consideration on the significant issue raised in the petition.[11]

Respectfully submitted,

CARL R. NELSON
FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL AND BANKER, P.A.
P.O. Box 1438
Tampa, Florida 33601
Phone: 813-228-7411
Fax: 813-229-8313

Member of the United States Supreme Court Bar

Attorney for the Amicus Curiae

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[11] It is not known when the Eleventh Circuit will render its decision in the consolidated cases. At oral argument on January 15, 1998, the undersigned counsel advised the panel that the Eleventh Amendment issue included in the cases might be affected by this Court's decision in *State of California, State Lands Commission v. Deep Sea Research, Inc.*, case no. 96-1400, and it is believed that the Eleventh Circuit might wait for such potential guidance. Additionally, the Clerk of the Eleventh Circuit, on April 10, 1998, issued a memorandum requesting supplemental briefing on the Eleventh Amendment issue that will take 50 days to accomplish.

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT OF BOUCHARD TRANSPORTATION CO., INC., TUG CAPTAIN FRED BOUCHARD INC., AND B NO. 155 CORPORATION, FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNER OR AS OWNER *PRO HAC VICE* OF TUG CAPT. FRED BOUCHARD AND BARGE B. NO. 155.

CASE NO. 94-233-Civ-T-2iB

_____/

INJUNCTION

Plaintiffs, BOUCHARD TRANSPORTATION CO., INC., TUG CAPTAIN FRED BOUCHARD INC., and B NO. 155 CORPORATION (collectively "BOUCHARD"), having on February 9, 1994, filed a Complaint for exoneration from or limitation of liability in respect to losses and damages arising out of a voyage of Tug CAPT. FRED BOUCHARD and Barge B. NO. 155 on August 10, 1993, and BOUCHARD having stated in its Complaint the facts and circumstances upon which exoneration from or limitation of liability are claimed, and having filed an ad *interim* Stipulation of value, duly executed by BOUCHARD, as Principal, the performance of which has been secured in accordance with the rules and practice of

this Court, and it appearing that BOUCHARD desires to obtain a restraining order, it is

ORDERED that the further prosecution of any pending actions, suits or legal proceedings in any court whatsoever, and the institution and prosecution of any suits, actions, or legal proceedings of any nature or description whatsoever in any court whatsoever, except in this proceeding for exoneration from or limitation of liability, against BOUCHARD TRANSPORTATION CO., INC., TUG CAPTAIN FRED BOUCHARD INC., or B NO. 155 CORPORATION or against Tug CAPT. FRED BOUCHARD and Barge B. NO. 155 or other property or their underwriters in respect of any claim or claims arising out of or connected with the aforesaid voyage of August 10, 1993, be, and the same are hereby, stayed and restrained until the hearing and determination of this proceeding; and it is further

ORDERED, that the notice provision of subsection (4) of Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims (Rule F) and the Claims and Answer provisions of subsection (5) of Rule F are not to apply to any person who presents a claim to Turnaboat Services, Ltd. for oil pollution damages as defined in the Oil Pollution Act of 1990, 33 U.S.C. § 2702, unless and until that person brings a lawsuit in any Court, at which time Plaintiffs must serve Notice on that person in accordance with Rule F(4) and thereupon that person shall file a claim and answer herein in accordance with Rule F(5).

ORDERED that service of this Injunction as a restraining order may be made by mailing a copy of this

Injunction to the person or persons to be restrained or to their respective attorneys or representatives.

DONE AND ORDERED in Chambers at Tampa, Florida this 9th day of February , 1994

/s/ Thomas G. Wilson
UNITED STATES
MAGISTRATE JUDGE

CARL R. NELSON
Florida Bar No. 280186
FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL & BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
(813) 228-7411

Attorneys for BOUCHARD

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT OF MARITRANS OPERATING PARTNERS LP and MARITRANS GENERAL PARTNER INC. FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNER OF THE TUG SEAFARER, Official No. 532672 and BARGE OCEAN 255, Official No. 534910.
_____/

Case No: 94-227Civ-T-2iB

INJUNCTION

The Plaintiff, Maritrans Operating Partners LP and Maritrans General Partner Inc. ("Maritrans"), having on February 8, 1994, filed a Complaint for exoneration from or limitation of liability in respect to losses and damages arising out of a voyage of the Tug SEAFARER and Barge OCEAN 255 on August 10, 1993, and Maritrans having stated in its Complaint the facts and circumstances upon which exoneration from or limitation of liability are claimed, and having filed an ad interim Stipulation of value, duly executed by Maritrans, as Principal, the performance of which has been secured in accordance with the rules and practice of this Court, and it appearing that Maritrans desires to obtain a restraining order, it is

ORDERED that the further prosecution of any pending actions, suits or legal proceedings in any court whatsoever, and the institution and prosecution of any suits, actions, or legal proceedings of any nature or description whatsoever in any court whatsoever, except in this proceeding for exoneration from or limitation of liability, against Maritrans or against the Tug SEAFARER and Barge OCEAN 255 in respect of any claim or claims arising out of or connected with the aforesaid voyage of August 10, 1993, be, and the same are hereby, stayed and restrained until the hearing and determination of this proceeding; and it is further

ORDERED, that the notice provision of subsection (4) of Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims (Rule F) and the claims and Answer provisions of subsection (5) of Rule F are not to apply to any person who presents a claim to Turnaboat Services, Ltd. for oil pollution damages, as that term is defined in the Oil Pollution Act of 1990, 33 U.S.C. § 2702, unless and until that person brings a lawsuit in any Court, at which time Plaintiff must serve Notice on that person in accordance with Rule F(4) and thereupon that person shall file a claim and answer herein in accordance with Rule F(5).

ORDERED that service of this Injunction as a restraining order may be made by mailing a copy of this Injunction to the person or persons to be restrained or to their respective attorneys or representatives.

DONE AND ORDERED in Chambers at Tampa, Florida this 8 day of February, 1994.

/s/ Thomas G. Wilson
UNITED STATES
MAGISTRATE
JUDGE

NATHANIEL G.W. PIEPER
Florida Bar No: 105512
DAVID W. McCREADIE
Florida Bar No: 308269
LAU, LANE, PIEPER, CONLEY
& McCREADIE, P.A.
Post Office Box 838
Tampa, Florida 33601
(813) 229-2121

Attorneys for Maritrans